Awarding Attorneys' Fees

Judge Wayne Purdom, DeKalb Co. State Crt.

State Court Judges 2009 Spring Conference

Brasstown Valley Conference Center

I. OCGA § 13-1-11 - LIQUIDATED

A. Types of contracts covered: "Obligations to pay attorney's fees upon any note or other evidence of indebtedness" - subsection c also specifically mentions bills of sale and security deeds

1. General rule - "Accordingly, we hold that the term 'evidence of indebtedness,' as used in OCGA § 13-1-11, has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money." *RadioShack Corp. v. Cascade Crossing II, LLC*, 282 Ga. 841, 653 S.E.2d 680 (2007) ; *but see Vaughters v. Outlaw*, 293 Ga. App. 620, 668 S.E.2d 13 (2008) (did not apply to personal services agreement).
2. Examples: Accounts (Anderson v. Hendrix, 175 Ga. App. 720, 334 S.E.2d 697 (1985)); Lease (*RadioShack Corp.*); personal guaranty on note (*Groover v. Commercial Bancorp*, 220 Ga. App. 13, 17 (1) (d)) (467 S.E.2d 355) (1996); gas supplied pursuant to K - *Ahmad v. Excell Petroleum, Inc.*, 276 Ga. App. 167, 623 S.E.2d 6 (2005).
   - **Note** - Attorney fee provisions provisions in residential leases must be reciprocal or are void. OCGA § 44-7-2(c). Is a lease evidence of indebtedness to tenant?
3. 13-1-11 does not apply personal services contract: *O'Brien's Irish Pub, Inc. v. Gerlew Holdings, Inc.*, 175 Ga. App. 162, 332 S.E.2d 920 (1985) (Exclusive listing contract is not a "note or other evidence of indebtedness" within the meaning of subsection (a)); *Holcomb v. Evans,* 176 Ga. App. 654, 337 S.E.2d 435 (1985); *Vaughters v. Outlaw*, 293 Ga. App. 620, 668 S.E.2d 13, 2008 (atty fees) cited to 13-6-11 case for standard ;
   - 13-1-11 doesn't appear to be optional. Is 15% attorney fees a reasonable liquidated damages provision?
4. *See Colonial Bank v. Boulder Bankcard Processing,* 254 Ga. App. 686, 693 (8) (563 SE2d 492) (2002) (did not apply to indemnity agmt)**??** This case predates *RadioShack Corp* standard, but was cited with approval in *Vaughters*. My view is scope of contracts covered is unsettled, closely divided Supreme Court enunciated broad general rule quoted above in passing obiter dicta which seems inconsistent with Court of Appeals decisions.
5. What if 13-1-11 does not apply to contract? If standard is "reasonable atty fees," proof is similar to under 13-6-11. *Vaughters*..

B. Amount

1. If specified, up to 15% - if over 15%, reduce to 15%
2. "reasonable" = 15% of first $500 plus 10% of amounts over $500 = (for amounts over $500) 10% + $25
   - "reasonable attorneys' fees not to exceed 15%" (*Lakeview Memory Gardens, Inc. v. National Bank & Trust Co.*, 155 Ga. App. 478, 271 S.E.2d 219 (1980)) treated as "reasonable."

C. Notice - requires written notice that attorney fees provision will be enforced and must give debtor 10 days to pay without attorney fees

1. notice in complaint OK - *Shier v. Price*, 152 Ga. App. 593, 595 (2) (263 SE2d 466) (1979); *SunTrust Bank v. Hightower*, 291 Ga. App. 62; 660 S.E.2d 745; 2008; *New House Prods., Inc. v. Commercial Plastics & Supply Corp.*, 141 Ga. App. 199, 233 S.E.2d 45 (1977) (letter attached to complaint); *Third Century, Inc. v. Morgan*, 187 Ga. App. 718, 371 S.E.2d 262 (1988) (note attached only failed because no 10-day out

described)

2. Must give 10 days from receipt or attempted delivery to pay -10 days from letter date - no *Gorlin v. First Nat'l Bank*, 150 Ga. App. 637, 258 S.E.2d 290 (1979).
3. Requirements: The demand letter failed to satisfy the statutory requirements for the right to attorney fees, because it failed: (1) to identify the holder of the notes making demand, i.e., Trust Associates, its assigns, its attorney, or its trustee; (2) to identify the notes to which the demand was given for payment; and (3) to specify that ten days from the date of receipt of the notice would be given the debtor for payment prior to the imposition of the sanctions. O.C.G.A. § 13-1-11(a)(3) . To be a proper demand notice, it must as a matter of substance: (1) be in writing; (2) to the party sought to be held on the obligation; (3) after maturity; (4) to state that the provisions relative to payment of attorney fees in addition to principal and interest will be enforced; and (5) to state that the party has ten days from the receipt of such notice to pay the principal and interest without the attorney fees. *Trust Assoc. v. Snead,* 253 Ga. App. 475, 559 S.E.2d 502 (2002).
4. Substantial compliance is all that is required -
   a. notice need not state amount due - *Assocs. Commercial Corp. v. Storey*, 192 Ga. App. 199, 384 SE2d 265 (1989) (and citations therein).
   b. face value of note "plus interest" OK. *Shier v. Price*, 152 Ga. App. 593, 263 SE2d 466 (1973).
   c. $2000 discrepancy in amount proved v. amount claimed in notice did not invalidate notice. *Carlos v. Murphy Wise Whse. Co.*, 166 Ga. App. 406, 304 S.E.2d 439 (1983); *see also Assocs. Commercial Corp. v. Storey,* 192 Ga. App. 199, 384 SE2d 265 (1989) (erroneous amount in complaint but "statement not contained in the portion of the complaint included as the statutory notice.")

D. Attorney fees are only collectable where debt is collected by or through an attorney. *Citizens & S. Nat'l Bank v. Bougas*, 149 Ga. App. 722, 256 S.E.2d 37 (1979), rev'd in part on other grounds, 245 Ga. 412, 265 S.E.2d 562 (1980).

II. § 13-6-11. Attorney fees & Expenses of litigation

The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

A. "This section may be applied to suits in both contract and tort," despite being part of the contract title. *Trust Co. Bank of Augusta v. Henderson*, 185 Ga App. 367, 364 S.E.2d 289 (1987), affirmed 258 Ga. 703, 373 S.E.2d 738.

B. Section limited only to plaintiffs (*Cox Interior, Inc. v. Bayland Props., LLC*, 293 Ga. App. 612, 667 S.E.2d 452 (2008)), including, however, plaintiffs in counterclaim bringing a successful, ***independent*** counterclaim. *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980), cert. denied, 156 Ga. App. 425, 274 S.E.2d 786 (1981); *see Caincare, Inc. v. Ellison*, 272 Ga. App. 190, 612 S.E.2d 47 (2005) (where trial court should have directed verdict on counterclaim, no viable counterclaim for an award).
   - Damages for litigation expenses are available under § 13-6-11 to a defendant only where the defendant has brought a counterclaim asserting a claim for relief wholly independent of any assertion as to plaintiff's bad faith, litigiousness, and/or harassment in bringing the underlying action. *Steele v. Russell*, 262 Ga. 651, 424 S.E.2d 272 (1993).

C. Must be specially pled. OCGA § 13-6-11; *Henderson*; *Williams v. Binion*, 227 Ga. App. 893, 490 S.E.2d 217 (1997). Generally this requires reference to statute or magic words: "bad faith", "stubborn litigiousness," or "unnecessary trouble and expense." *Pipe Solutions, Inc. v. Inglis*, 291 Ga. App. 328, 661 S.E.2d 683 (2008) ("attorney's fees in an amount to be proven" insufficient and court will not readily find issue tried by consent).

D. Apportionment of expenses - "[P]laintiff, however, is entitled to recover attorney fees only for that portion of the fees which are allocable to the attorney's efforts to prosecute the cause of action, against a particular defendant, on which the prayer for attorney fees is based. See Fuller v. Moister, 248 Ga. 287 (282 S.E.2d 889) (1981); Altamaha &c. Center v. Godwin, 137 Ga. App. 394, 399 (3) (224 SE2d 76) (1976)." *Arford v. Blalock*, 199 Ga. App. 434, 405 S.E.2d 698 (1991); *accord, Forsyth County v. Martin*, 279 Ga. 215 610 S.E.2d 512 (2005) *Monterrey Mexican Rest. of Wise, Inc. v. Leon*, 282 Ga. App. 439, 638 S.E.2d 879 (2006). Failure to apportion the attorney fees will result in reversal/remand. *Premier Cabinets v. Bulat*, 261 Ga. App. 578, 582 (5) (583 S.E.2d 235) (2003). Burden of proof in segregation of fees is on person seeking fees. *Whitakerv. Houston County Hosp. Auth.*, 272 Ga.App 870, 613 S.E.2d 664 (2005).
   - No requirement to pro-rate on parts of one cause of action *Daniel v. Smith*, 266 Ga. App. 637 (597 SE2d 432) (2004) (between liability and damages) (*see* E2c, below); *but see Fuller v. Moister*, 248 Ga. 287 (282 S.E.2d 889) (1981) and citation to it by *Arford v. Blalock*, 199 Ga. App. 434, 405 S.E.2d 698 (1991); .

E. Grounds

1. Bad faith

   a. Relates to conduct in underlying transactions - "Bad faith other than mere refusal to pay a just debt is sufficient, provided it is not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive. So defendants can be held liable for attorney fees if they committed the breach in bad faith." *Ryland Group v.*

Daley, 245 Ga. App. 496, 537 S.E.2d 732 (2000)*(overturned on other grounds, John Thurmond & Assocs. v. Kennedy*, 284 Ga. 469, 668 S.E.2d 666 (2008)). With contract can be bad faith in making or performance of contract. *Daley; Parks v. Breedlove,* 241 Ga. App. 72 (1999); *Wheat Enterprises v. Redi-Floors*, 231 Ga. App. 853, 856-857 (1) (c) (501 S.E.2d 30) (1998) (breach related to conflicting testimony about whether additional work was authorized).

Comment - keep in find that although question is bad faith in the underlying transaction, lying about the facts in litigation may circumstantially support the inference of bad faith.

b. "'Every intentional tort invokes a species of bad faith that entitles a person wronged to recover the expenses of litigation including attorney fees.' *Ponce De Leon Condominiums v. DiGirolamo*, 238 Ga. 188, 190 (232 S.E.2d 62) (1977) [trespass from failure to end water run-off]." *Tyler v. Lincoln,* 272 Ga. 118, 527 S.E.2d 180 (2000); *but see Multimedia Technologies, Inc. v. Wilding*, 262 Ga. App. 576(6b), 586 S.E.2d 74 (2003) (award of atty fees not required, especially when defendant urges mitigating evidence). Bad faith atty fees may be awarded when damages are nominal. *Tyler*
   - Actual knowledge of defect (product) *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 SE2d 470 (1984).
   - Fire regulations v. landlord. *Windermere v. Bettes*, 211 Ga. App. 177, 438 S.E.2d 406 (1993). *Windermere* suggests, logically, that evidence sufficient for punitive damages is sufficient for bad faith atty fees.
   - DUI. *Knobeloch v. Mustascio*, 640 F. Supp. 124 (N.D. Ga. 1986).

c. Bona fide controversy no defense - If the jury finds that a party acted in bad faith concerning the transactions and dealings out of which the cause of action arose, it does not matter whether or not there was a bona fide controversy as to liability. *Parks*; *accord, Southern Co. v. Hamburg,* 220 Ga. App. 834, 470 S.E.2d 467 (1996).

d. Bad faith is a question for the jury, evidence is judged under the "any evidence" standard (*Wheat Enterprises)*, and "Even slight evidence of bad faith can be enough to create an issue for the jury." *City of Lilburn v. Astra Group,* 286 Ga.App. 568, 649 S.E.2d 813 (2007).

2. Stubborn litigiousness or the causing of unnecessary trouble and expense.

a. Default admits the allegation of stubborn litigiousness and establishes liability for attorney fees; it is error to refuse attorney fees upon proof of the amount (*Fresh Floors v. Forrest Cambridge Apartments*, 257 Ga.App. 270, 272, 570 S.E.2d 590 (2002); *Hartford Ins. Co. v. Mobley*, 164 Ga. App. 363, 297 S.E.2d 312 (1982)) if default is not set aside. Cases intimate that without legal defense to claim one cannot contest stubborn litigiousness after default.
   - *Compare Multimedia Technologies, Inc. v. Wilding*, 262 Ga. App. 576(6b), 586 S.E.2d 74 (2003) (award of atty fees not required, citing "may" language in statute, despite intentional tort).

b. Bona fide controversy(BFC) is defense to these grounds. *Latham v. Faulk*, 265 Ga. 107; 454 S.E.2d 136 (1995) (no unnecessary trouble if BFC).

(1) "[I]t is for the jury to determine whether there was a bona fide controversy, unless the facts preclude such a finding as a matter of law." *Webster v. Brown*, 213 Ga. App. 845, 846 (2) (446 SE2d 522) (1994).

(2) *Compare Daniel v. Smith*, 266 Ga. App. 637 (597 SE2d 432) (2004) (jury); *Spring Lake Property Owners Assn. v. Peacock,* 260 Ga. 80 (390 SE2d 31) (1990); *Jackson v. Brinegar, Inc.*, 165 Ga. App. 432 (301 SE2d 493) (1983) with *Anderson v. Cayes*, 278 Ga. App. 592, 630 S.E.2d 441 (2006); *Latham* (dispute of terms of oral contract); *Webster*; *Backus Cadillac-Pontiac v. Brown,* 185 Ga. App. 746 (365 SE2d 540) (1988)(matter of law). Where there is a conflict in the testimony material to liability, there will normally be a BFC even though Plaintiff contends Defendant is untruthful (such as the assertion of admissions which are denied by defendant). Where Defendant changes story in litigation that may make a jury issue as to BFC. For a more nebulous example of no BFC as a matter of law, *see Free v. Lankford & Assocs., Inc.,* 284 Ga. App. 328; 643 S.E.2d 771 (2007).

c. "... a jury may award attorney fees under OCGA § 13-6-11 if there is no bona fide controversy as to liability, even if there is a bona fide controversy as to damages." *Daniel v. Smith*, 266 Ga. App. 637 (597 SE2d 432) (2004); *Southern R. Co. v. Crowe*, 186 Ga. App. 244, 246-248 (2) (366 S.E.2d 846) (1988); *Delta Air Lines v. Isaacs*, 141 Ga. App. 209, 211 (3) (233 S.E.2d 212) (1977); *Buffalo Cab Co. v. Williams*, 126 Ga. App. 522, 525 (191 SE2d 317) (1972). This applies when defendant contests both liability and damages, but there is only a BFC as to damages.

d. Evidence of settlement discussions may be relevant. *See Free v. Lankford & Assocs., Inc.*, 284 Ga. App. 328; 643 S.E.2d 771 (2007) (willingness to "work something out" expressed prior to complaint); *Webster v. Brown*, 213 Ga. App. 845, 846 (2) (446 SE2d 522) (1994) (settlement offer greater than recovery with defense as to liability as well as damages).

F. Where cause of action is federal, *see Nissan Motor Acceptance Corp. V. Stovall Nissan, Inc.,* 224 Ga. App. 295, 480 SE2d 322 (1997) (not preempted by 15 USCS § 1222); *PolyGram Group Distr., Inc. v. Transus, Inc.,* 990 F. Supp. 1454 (N.D. Ga. 1997) (preempted under Carmack Amendment).

G. May award fees under this section despite contract provision than party will not be liable for atty fees. *DOT v. Dalton Paving & Constr.*, 227 Ga. App. 207, 489 S.E.2d 329 (1997).

H. Proof of damages requires expert testimony, is unliquidated, and cannot be resolved through summary judgement. *Am. Med. Transp. Group v. Glo-An, Inc.*, 235 Ga. App. 464, 509 S.E.2d 738 (1998).

1. No award for appellate expenses. *David G. Brown, P.E. v. Kent*, 274 Ga. 849, 561 S.E.2d 89 (2002).
2. Contingent fee contract as proof of reasonable fee. *City of Atlanta v. Hofrichter*, 291 Ga. App. 883, 663 S.E.2d 379 (2008)(contingent fee award upheld with minimal expert testimony in support - 26 depositions, "hundreds of hours," and specified expenses); *Home Depot U.S.A. v. Tvrdeich,* 268 Ga. App. 579, 584 (2) (602 SE2d 297) (2004). One must, however, have expert testimony that the fee is usual and customary or otherwise a valid indication of the value of the work. *Patton v. Turnage,* 260 Ga. App. 744, 748 (2) (580 SE2d 604) (2003).

I. Findings of fact - when court makes award, must make finding of fact as to statutory and/or conduct on which atty fees are based. *Parland v. Millennium Constr. Servs., LLC,* 276 Ga. App. 590, 623 S.E.2d 670 (2005).

III. § 9-15-14. Attorney's fees and expenses of litigation where attorney brings or defends action lacking substantial justification

(a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense. or other position. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.
(b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.
(c) No attorney or party shall be assessed attorney's fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority.
(d) Attorney's fees and expenses of litigation awarded under this Code section shall not exceed amounts which are reasonable and necessary for defending or asserting the rights of a party. Attorney's fees and expenses of litigation incurred in obtaining an order of court pursuant to this Code section may also be assessed by the court and included in its order.
(e) Attorney's fees and expenses under this Code section may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition of the action.
(f) An award of reasonable and necessary attorney's fees or expenses of litigation under this Code section shall be determined by the court without a jury and shall be made by an order of court which shall constitute and be enforceable as a money judgment.
(g) Attorney's fees and expenses of litigation awarded under this Code section in a prior action between the same parties shall be treated as court costs with regard to the filing of any subsequent action.
(h) This Code section shall not apply to proceedings in magistrate courts. However, when a case is appealed from the magistrate court, the appellee may seek litigation expenses incurred below if the appeal lacks substantial justification.

A. Any party may use § 9-15-14; claims for unnecessary expansion or harassment under § 9-15-14(b) may be brought by loser against prevailing party. *Betallic, Inc. v. Deavours,* 263 Ga. 796, 439 S.E.2d 643 (1994). Fees are awarded to party, not directly to attorney. *Brewer v. Paulk*, 296 Ga. App. 26, 673 S.E.2d 545 (2009); *but see Slone v. Myers*, 288 Ga. App. 8, 653 S.E.2d 323 (2007) (although subsection (a) may be so restrcted, (b) is not).
   1. Attorney representing self may recover fees. *Harkleroad v. Stringer*, 231 Ga. App. 464, 468 (1) (499 SE2d 379) (1998).

2. Persons liable are parties and attorneys. *Allstate Ins. Co. v. Reynolds*, 210 Ga. App. 318, 436 S.E.2d 56 (1993); *Swafford v. Bradford*, 225 Ga. App. 486, 484 S.E.2d 300 (1997).
3. OCGA 51-7-81 can reach non-party actors in litigation. *Slone v. Myers*, 288 Ga. App. 8, 653 S.E.2d 323 (2007).

B. Procedure

1. Time - may be brought at any time up until 45 days after final disposition.
   a. If court directs immediate entry of judgment, §9-15-14 motion with respect to that claim must be brought w/n 45 days. *Little v. GMC*, 229 Ga. App. 781, 495 S.E.2d 572 (1998); *but see Meister v. Brock*, 268 Ga. App. 849, 602 S.E.2d 867 (2004) (refused to apply to dismissal w/o prejudice - I think case rightly decided for unexpressed reason - defense of §9-15-15 claim).

Note - for many years until statute was amended, § 9-15-14 claim was premature if brought before final disposition. *Betallic, Inc.*

2. Motion - fees must be requested by motion, counterclaim or pretrial order claim is insufficient. *Glass v. Glover*, 241 Ga. App. 838 (528 SE2d 262) (2000); *accord, Nuckols v. Nuckols,* 226 Ga. App. 194 (486 SE2d 194) (1997); *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007). Motion may be oral at hearing or trial and may convert counterclaim to motion. *Nesbit v. Nesbit,* 295 Ga. App. 763, 673 S.E.2d 272 (2009) (reversed denial based upon lack of motion); *but see Williams v. Cooper,* 280 Ga. 145, 625 S.E.2d 754 (2006).

Comment - I question whether Supreme Court would follow this rule - particularly if claim present in pretrial order. Where a timely counterclaim is present, I suggest proactive action.

3. Sua sponte - Court may act sua sponte in considering fees, but must give appropriate notice and opportunity to be heard (rule nisi to party facing possible assessment). *Glass*; *accord, Williams v. Cooper,* 280 Ga. 145, 625 S.E.2d 754 (2006) ("What the statute provides as the means of giving proper notice is a motion for such fees filed of record by a party or some form of notice to any person potentially liable for an assessment of fees under the statute that the trial court is considering its own motion for the imposition of the sanctions made available by the statute.") Notice of hearing on attorney fees insufficient if it doesn't notify of liability under § 9-15-14, rather than another provision. *Williams*; *Moon v. Moon*, 277 Ga. 375, 378 (6) (589 SE2d 76) (2003). Example: OCGA 9-11-37.
4. Right to evidentiary hearing - responding party has a right to an evidentiary hearing to confront and cross-examine the testimony on fees (*Green v. McCart*, 273 Ga. 862, 863 (1) (548 SE2d 303) (2001)); however, that right may be waived if the reasonableness of the fees is not objected to and no request for hearing is made. *MacDonald v. Harris*, 266 Ga. App. 287, 597 S.E.2d 125 (2004); *Munoz v. Am. Lawyer Media, L.P.,* 236 Ga. App. 462, 467 (3)(a) (512 S.E.2d 347) (1999); *but see Williams v. Cooper,* 280 Ga. 145, 625 S.E.2d 754 (2006); *Slone v. Myers*, 288 Ga. App. 8, 653 S.E.2d 323 (2007) (request for appearance by telephone which was not granted did not waive right to hearing).
   a. Motion subject to USCR 6.2: if no timely response is filed, court may rely on movant's affidavits to support award; court has discretion then whether or not to allow late affidavits or receive oral testimony at hearing. *Wallace v. Noble Vill. at Buckhead Senior Hous., LLC.*, 292 Ga. App. 307, 664 S.E.2d 292 (2008).
5. Findings specifying improper conduct required - Order awarding attorney fees under

9-15-14 must include findings of conduct that authorize the award. *Cason v. Cason*, 281 Ga. 296, 637 S.E.2d 716 (2006); *Johnston v. Correale*, 285 Ga. App. 870, 648 S.E.2d 180 (2007) ("for having to defend himself against the spurious claims and groundless Complaint initially filed by the Plaintiff" insufficient); *Interfinancial Midtown v. Choate Constr. Co.,* 284 Ga. App. 747, 752-753 (3)(b) (644 SE2d 281) (2007) ("motion was filed 'without justification,' that a hearing on the subject 'confirmed [its] utter lack of merit'" insufficient); *Note Purchase Co. of Ga., LLC v. Brenda Lee Strickland Realty, Inc.,* 288 Ga. App. 594, 654 S.E.2d 393 (2007) ("the above-styled lawsuit lacks substantial justification." insufficient); *Brewer v. Paulk*, 296 Ga. App. 26, 673 S.E.2d 545 (2009) ("The trial court failed to specifically address each of the twelve counts of the complaint or to make a specific finding that all the claims were frivolous for the reasons stated in its order.") In its findings of fact for granting an award of attorney fees, a trial court must specify the conduct upon which the award is made. *MacDonald v. Hams*, 266 Ga. App 287, 597 S.E.2d 125 (2004).

Note - this is much higher standard than discovery dispute awards under OCGA § 9-11-37.

C. Standards

1. § 9-15-14(a) Award required if meets statutory test ("shall"). *Ferguson v. City of Doraville,* 186 Ga. App. 430 (2a) (367 S.E.2d 551) (1988) (counsel's good faith conceded). Standard is objective.
   a. "if the party defending against the motion advances a justiciable issue of law or fact and produces evidence to support it, it is error for the trial court to award fees under OCGA § 9-15-14 (a). Kendall v. Delaney, 283 Ga. 34, 36 (656 SE2d 812) (2008)." *Brewer v. Paulk*, 296 Ga. App. 26, 673 S.E.2d 545 (2009).
   b. If there is no justiciable issue, error to deny fees. *Harkleroad & Hermance, P.C. v. Stringer,* 220 Ga. App. 906, 472 S.E.2d 308 (1996).
   c. Reviewed under "any evidence" standard. Id.
2. § 9-15-14(b) Discretionary award ("*may*"). *Johnston v. Correale*, 285 Ga. App. 870, 648 S.E.2d 180 (2007). Standard is more subjective and involves intent. The standard of review for motions under subsection (b) of O.C.G.A. § 9-15-14 is the "abuse of discretion" rule. *Gibson v. Southern Gen. Ins. Co.,* 199 Ga. App. 776, 406 S.E.2d 121 (1991). **Comment** - The Court of Appeals is not shy about finding an abuse of discretion in this area.
   a. Where a party has some substantial basis prior to suit for the claim, he or she may insist on the production of admissible, competent evidence rather than accepting representations of opposing counsel. *Wallace v. Noble Vill. at Buckhead Senior Hous., LLC.,* 292 Ga. App. 307, 664 S.E.2d 292 (2008).
   b. Failure to disclose as basis for expansion of litigation. *Hall v. Hall*, 241 Ga. App. 690, 527 S.E.2d 288 (1999) (spouse didn't mention child and she had moved out-of-state until parties and court spent most of day trying to work out visitation plan).
   c. Refusal to acknowledge attorney's authority to settle. *Ford v. Hanna*, 293 Ga. App. 863, 668 S.E.2d 271 (2008).
   d. Failure to agree to telephonic depo insufficient. *Ingram v. Star Touch Communications, Inc.*, 215 Ga. App. 329, 450 S.E.2d 334 (1994).
3. Summary judgment cases - Denial of summary judgment no longer precludes an award under § 9-15-14. *Porter v. Felker,* 261 Ga. 421 (405 S.E.2d 31) (1991) ("trial court not

required to be infallible" - overturned long line of authority); however, "a trial court's award to a party whose motion for summary judgment was denied must be vacated except in unusual cases where the trial judge could not, at the summary judgment stage, foresee facts authorizing the grant of attorney fees. 261 Ga. at 422 (3). This would mainly apply to § 9-15-14(a) not awards for unnecessary expansion or harassment under § 9-15-14(b). *Betallic, Inc. v. Deavours,* 263 Ga. 796, 439 S.E.2d 643 (1994).

4. § 9-15-14(c): Arguments to extend law - for an example where major effort fell short: *Ferguson v. City of Doraville,* 186 Ga. App. 430 (367 S.E.2d 551) (1988) (Benham, Deen, JJ. dissenting). This defense only applies "if such new theory of law is based on some recognized precedential or persuasive authority" - truly innovative arguments cannot claim this provision - hence Judge Benham's dissent , suggesting that first arguments against segregation would not have qualified.
5. Not based on pre-suit actions. *Cobb County v. Sevani*, 196 Ga. App. 247, 395 S.E.2d 572, cert. denied, 196 Ga. App. 907, 395 S.E.2d 572 (1990).
6. When considering liability of attorney, must consider substantial justification based upon attorney's knowledge (a) and bad faith or good faith of attorney (b). *Northen v. Mary Anne Frolick & Assocs.,* 236 Ga. App. 7, 510 S.E.2d 857 (1999). Have not seen cases that client can argue good faith based on the fact that the attorney did it.

D. Proof of amount - must show both amount and reasonableness. *Johnston v. Correale.*

1. No award for appellate expenses. *Castro v. Cambridge Square Towne Houses, Inc.*, 204 Ga. App. 746, 420 S.E.2d 588, cert. denied, 204 Ga. App. 921, 420 S.E.2d 588 (1992); *Fulton County Tax Comm'r v. GMC,* 234 Ga. App. 459, 507 S.E.2d 772 (1998); *Harkleroad v. Stringer,* 231 Ga. App. 464, 499 S.E.2d 379 (1998).

IV. § 33-4-6. Liability of insurer for damages and attorney's fees on bad faith refusal to pay claims

(a) In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $ 5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer. The action for bad faith shall not be abated by payment after the 60 day period nor shall the testimony or opinion of an expert witness be the sole basis for a summary judgment or directed verdict on the issue of bad faith. The amount of any reasonable attorney's fees shall be determined by the trial jury and shall be included in any judgment which is rendered in the action; provided, however, the attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of the services based on the time spent and legal and factual issues involved in accordance with prevailing fees in the locality where the action is pending; provided, further, the trial court shall have the discretion, if it finds the jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend the portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. The limitations contained in this Code section in reference to the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and the plaintiff's attorney for the services of the attorney in the action against the insurer.

(b) In any action brought pursuant to subsection (a) of this Code section, and within 20 days of bringing such action, the plaintiff shall, in addition to service of process in accordance with Code Section 9-11-4, mail to the Commissioner of Insurance and the consumers' insurance advocate a copy of the demand and complaint by first-class mail. Failure to comply with this subsection may be cured by delivering same.

§ 33-4-7. Affirmative duty to fairly and promptly adjust in incidents covered by motor vehicle liability policies; actions for bad faith; notice to Commissioner of Insurance and consumers' insurance advocate

(a) In the event of a loss because of injury to or destruction of property covered by a motor vehicle liability insurance policy, the insurer issuing such policy has an affirmative duty to adjust that loss fairly and promptly, to make a reasonable effort to investigate and evaluate the claim, and, where liability is reasonably clear, to make a good faith effort to settle with the claimant potentially entitled to recover against the insured under such policy. Any insurer who breaches this duty may be liable to pay the claimant, in addition to the loss, not more than 50 percent of the liability of the insured for the loss or $5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action.

(b) An insurer breaches the duty of subsection (a) of this Code section when, after investigation of the claim, liability has become reasonably clear and the insurer in bad faith offers less than the amount reasonably owed under all the circumstances of which the insurer is aware.

(c) A claimant shall be entitled to recover under subsection (a) of this Code section if the claimant or the claimant's attorney has delivered to the insurer a demand letter, by statutory overnight delivery or certified mail, return receipt requested, offering to settle for an amount certain; the insurer has refused or declined to do so within 60 days of receipt of such demand, thereby compelling the claimant to institute or continue suit to recover; and the claimant

ultimately recovers an amount equal to or in excess of the claimant's demand.
(d) At the expiration of the 60 days set forth in subsection (c) of this Code section, the claimant may serve the insurer issuing such policy by service of the complaint in accordance with law. The insurer shall be an unnamed party, not disclosed to the jury, until there has been a verdict resulting in recovery equal to or in excess of the claimant's demand. If that occurs, the trial shall be recommenced in order for the trier of fact to receive evidence to make a determination as to whether bad faith existed in the handling or adjustment of the attempted settlement of the claim or action in question.
(e) The action for bad faith shall not be abated by payment after the 60 day period nor shall the testimony or opinion of an expert witness be the sole basis for a summary judgment or directed verdict on the issue of bad faith.
(f) The amount of recovery, including reasonable attorney's fees, if any, shall be determined by the trier of fact and included in a separate judgment against the insurer rendered in the action; provided, however, the attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of the services based on the time spent and legal and factual issues involved in accordance with prevailing fees in the locality where the action is pending; provided, further, the trial court shall have the discretion, if it finds the jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend the portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. The limitations contained in this Code section in reference to the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and his or her attorney for the services of the attorney.
(g) In any action brought pursuant to subsection (b) of this Code section, and within 20 days of bringing such action, the plaintiff shall, in addition to service of process in accordance with Code Section 9-11-4, mail to the Commissioner of Insurance and the consumers' insurance advocate a copy of the demand and complaint by first-class mail. Failure to comply with this subsection may be cured by delivering same.

A. OCGA § 33-4-7 limited to motor vehicle personal property claims. It's a limited exception to the limitation against direct action. *Mills v. Allstate Ins. Co.,* 288 Ga. App. 257, 653 S.E.2d 850 (2007).
B. Claim by insured under OCGA § 33-4-6 cannot be assigned to injured plaintiff. *Canal Indem. Co. v. Greene,* 265 Ga. App. 67, 593 S.E.2d 41 (2003), but insurer may be liable for bad faith failure to settle.
C. Bad Faith
    1. Construe statutes together: "the statutory language of OCGA § 33-4-7 is similar to OCGA § 33-4-6, which provides that an insured may, in certain circumstances, recover damages for his insurer's bad faith failure to pay a covered claim. Given the similarity between the two statutes, we find the case law applying OCGA § 33-4-6 to be persuasive here. *King v. Atlanta Cas. Ins. Co.*, 279 Ga. App. 554, 631 S.E.2d 786 (2006).
    2. Bad faith is not like bad faith under § 13-6-11. *Canal Ins. Co. v. Lawson,* 123 Ga. App. 376, 181 S.E.2d 91 (1971).
    3. "Bad faith" is "any frivolous and unfounded refusal in law or in fact to pay according to the terms of the policy." *King.*
    4. Ordinarily, the question of good or bad faith regarding an insurer's failure to pay a covered claim by its insured is for the jury, but when there is no evidence of unfounded

reason for the nonpayment, or if the issue of liability is close, the court should disallow imposition of bad faith penalties. *King*.

5. Recovery barred if recovery substantially less than amount sought. *Georgia Farm Bureau Mut. Ins. Co. v. Boney*, 113 Ga. App. 459, 148 S.E.2d 457 (1966). But, "a failure to recover the full amount sued for will not, after a denial of any liability by the insurer, preclude an insured from recovering a penalty and attorney's fees for bad faith." Hanover Ins. Co. v. Hallford, 127 Ga. App. 322, 193 S.E.2d 235 (1972).
6. "This is the intention of the statute authorizing damages and attorney fees against insurers for refusing to pay promptly which we perceive was to penalize them for resisting and delaying payment unless good cause was shown. . . . The proper rule is that the judgment should be affirmed if there is any evidence to support it unless it can be said as a matter of law that there was a reasonable defense which vindicates the good faith of the insurer." *Colonial Life & Accident Ins. Co. v. McClain,* 243 Ga. 263; 253 S.E.2d 745 (1979). "[T]he insurer's defense must be evaluated because if there was 'reasonable and probable cause to make it' an award for damages and attorney fees for bad faith is not authorized. Not every defense bars a finding of bad faith. It is a defense which raises a reasonable question of law or a reasonable issue of fact though not accepted by the trial court or jury." *Id.* Standard for sufficiency of evidence to go to the jury is similar to that for stubborn litigiousness under §13-6-11. *Ken-Mar Constr. Co. v. Bowen*, 245 Ga. 676, 266 S.E.2d 796 (1980).

D. Strict Construction on procedural requirements - The provision for damages and attorney's fees, being in the nature of a penalty, must be strictly construed. *Interstate Life & Accident Ins. Co. v. Williamson,* 220 Ga. 323, 138 S.E.2d 668, answer conformed to, 110 Ga. App. 557, 139 S.E.2d 429 (1964); *Progressive Cas. Ins. Co. v. Avery,* 165 Ga. App. 703, 302 S.E.2d 605 (1983).

§ 9-11-68. Written offers to settle tort claims; liability of refusing party for attorney's fees and expenses

(a) At any time more than 30 days after the service of a summons and complaint on a party but not less than 30 days (or 20 days if it is a counteroffer) before trial, either party may serve upon the other party, but shall not file with the court, a written offer, denominated as an offer under this Code section, to settle a tort claim for the money specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. Any offer under this Code section must:

(1) Be in writing and state that it is being made pursuant to this Code section;

(2) Identify the party or parties making the proposal and the party or parties to whom the proposal is being made;

(3) Identify generally the claim or claims the proposal is attempting to resolve;

(4) State with particularity any relevant conditions;

(5) State the total amount of the proposal;

(6) State with particularity the amount proposed to settle a claim for punitive damages. if any;

(7) State whether the proposal includes attorney's fees or other expenses and whether attorney's fees or other expenses are part of the legal claim; and

(8) Include a certificate of service and be served by certified mail or statutory overnight delivery in the form required by Code Section 9-11-5.

(b)(1) If a defendant makes an offer of settlement which is rejected by the plaintiff, the defendant shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the defendant or on the defendant's behalf from the date of the rejection of the offer of settlement through the entry of judgment if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such offer of settlement.
(2) If a plaintiff makes an offer of settlement which is rejected by the defendant and the plaintiff recovers a final judgment in an amount greater than 125 percent of such offer of settlement, the plaintiff shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the plaintiff or on the plaintiffs behalf from the date of the rejection of the offer of settlement through the entry of judgment.
(c) Any offer made under this Code section shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree, but an offerer shall not be entitled to attorney's fees and costs under subsection (b) of this Code section to the extent an offer is not open for at least 30 days (unless it is rejected during that 30 day period). A counteroffer shall be deemed a rejection but may serve as an offer under this Code section if it is specifically denominated as an offer under this Code section. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offerer. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine reasonable attorney's fees and costs under this Code section.
(d)(1) The court shall order the payment of attorney's fees and expenses of litigation upon receipt of proof that the judgment is one to which the provisions of either paragraph (1) or paragraph (2) of subsection (b) of this Code section apply; provided, however, that if an appeal is taken from such judgment, the court shall order payment of such attorney's fees and expenses of litigation only upon remittitur affirming such judgment.
(2) If a party is entitled to costs and fees pursuant to the provisions of this Code section. the court may determine that an offer was not made in good faith in an order setting forth the basis for such a determination. In such case, the court may disallow an award of attorney's fees and costs.
(e) Upon motion by the prevailing party at the time that the verdict or judgment is rendered, the moving party may request that the finder of fact determine whether the opposing party presented a frivolous claim or defense. In such event, the court shall hold a separate bifurcated hearing at which the finder of fact shall make a determination of whether such frivolous claims or defenses were asserted and to award damages, if any, against the party presenting such frivolous claims or defenses. Under this subsection:
(1) Frivolous claims shall include, but are not limited to, the following:
(A) A claim, defense, or other position that lacks substantial justification or that is not made in good faith or that is made with malice or a wrongful purpose, as those terms are defined in Code Section 51-7-80;
(B) A claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position; and
(C) A claim, defense, or other position that was interposed for delay or harassment;
(2) Damages awarded may include reasonable and necessary attorney's fees and expenses of

litigation; and
(3) A party may elect to pursue either the procedure specified in this subsection or the procedure specified in Code Section 9-15-14, but not both.

Fowler Properties, Inc. v. Dowland, _Ga._, 646 S.E.2d 197 (2007) (§ 9-11-68 unconstitutional to the extent it would apply to cases pending at time of enactment). See also, O.C.G.A. § 13-1-11 regarding enforcement of obligation to pay attorneys fees involved in collection of debt evidenced by note or other instrument.

V. OCGA §9-11-37 *See* Purdom, GEORGIA CIVIL DISCOVERY, (2008-2009 Ed), Chapter 16.

VI. Proof of UNLIQUIDATED ATTORNEY'S FEES

A. Claims and counterclaims

1. Where attorney fees are part of the cause of action, and evidentiary hearing will be required, even in cases of default, when the attorney fees must be reasonable. *Oden v. Legacy Ford-Mercury*, 222 Ga.App. 666, 668-669(2), 476 S.E.2d 43 (1996),
2. Where fees and expenses are assessed by motion URSC 6.2, 6.3, as well as OCGA § 9-11-43(b), may allow assessment without evidentiary hearing. *See generally Alcatraz Media, LLC v. Yahoo! Inc.,* 290 Ga. App. 882, 660 S.E.2d 797 (2008); *Franchell v. Clark,* 241 Ga. App. 128, 129 (1) (524 SE2d 512) (1999). It is generally discretionary with court whether to entertain oral testimony or late affidavits on motions.
   a. Where attorney fees arise from discovery abuse: *See Esasky v. Forrest*, 231 Ga. App. 488(3), 499 S.E.2d 413 (1998) ("a 'paper hearing' is su cient to protect the rights at issue"); *but see Santora v. American Combustion, Inc.,* 225 Ga. App. 771, 485 S.E.2d 34 (1997) (combined hearing under §§ 9-15-14 and 9-11-37 - Millich view this as requiring hearing).
   b. Where attorneys fees arise from OCGA § 9-15-14, wavier of hearing sometimes occurs, but appellate courts view respondent as having the right to a hearing unless waived. *See* III.B.4, above.
   c. Another way to avoid hearing - enter order finding liability on attorney fees and allow parties 10 days to request hearing (before or after finding amount based on paper submissions).

B. "It is well established that to recover attorney fees both their actual cost and their reasonableness must be shown." *Santora.*

1. The amount of the fees must be established by properly established business records, *Santora*, or through the personal testimony of the attorney who did the work. *Oden v. Legacy Ford-Mercury*, 222 Ga.App. 666, 668-669(2), 476 S.E.2d 43 (1996). "Billing statements are often used to prove actual costs. Subject to the laying of an adequate foundation, these statements are admissible under the business record exception to the hearsay rule, OCGA § 24-3-14.... OCGA § 24-3-14(c) provides that lack of personal knowledge by the maker of the records does not affect the records' admissibility but affects only the weight to be accorded this evidence." *Santora*; *accord, Southern Co. v. Hamburg,* 233 Ga. App. 135, 503 S.E.2d 383 (1998).
2. The fees must be shown to be reasonable and necessary. *Santora; Oden.* Reasonableness of fees must be affirmatively established. *Kwickie/Flash Foods, Inc. v. Lakeside*

Petroleum, Inc., 256 Ga. App. 556. 568 S.E.2d 816 (2002).

a. "To show the reasonableness of the actual costs demonstrated by the billing records. parties will usually proffer the opinion testimony of their counsel or other attorneys. But such testimony is not an invariable requirement. It is merely an effort to demonstrate what the expert witness considers a reasonable professional fee, in light of the particular litigation history of the case..... As we noted in Oden v. Legacy Ford-Mercury, 222 Ga.App. 666, 668-669(2), 476 S.E.2d 43 (1996), at a hearing held to determine the amount of attorney fees recoverable, 'each attorney for whose service compensation is sought must provide admissible evidence of fees in the form of personal testimony, or through the testimony of the custodian of the applicable billing records, as an exception to the hearsay exclusion. See OCGA § 24-3-1. The defendant has the right to cross-examine each witness on the amount and reasonableness of the fees and costs requested.' It is clear, however, that the witnesses need not be the attorneys or paralegals who performed the work." *Santora.* At a [default damages] hearing on attorneys fees to be awarded, an affidavit by counsel stating his own time and his hearsay knowledge of the time spent by his associates, was inadmissible. *Oden.*

b. Attorney may testify regarding the reasonableness of his fees without violating the general rule prohibiting the attorney as a fact witness in the case the attorney is trying). *Nichols v. Main St. Homes, Inc.*, 244 Ga. App. 591. 536 S.E.2d 278 (2000).

3. If the fees reflect some services that were not related to the cause of action for which attorney fees have been awarded then there must be testimony from a person with knowledge that segregates the recoverable fees from the others. Evidence was insufficient to support trial court's award of $18.000 in attorney fees (under § 9-15-14) to purchaser of real estate as a sanction for discovery abuse committed by vendor; purchaser's counsel did not testify as to how much of the total amount billed resulted from the discovery abuse. *Mills v. Parker*, 267 Ga.App 334 599 S.E.2d 301 (2004).

VII. Avoid Double Recovery of Attorney Fees under different statutes: *Sec. Life Ins. Co. of Am. v. St. Paul Fire & Marine Ins. Co.*, 278 Ga. 800; 606 S.E.2d 855 (2004); *Roofers Edge, Inc. v. Std. Bldg. Co.,* 295 Ga. App. 294; 671 S.E.2d 310 (2008) (13-6-11 & 9-11-37); Turpin v. Worley, 206 Ga. App. 341; 425 S.E.2d 895 (1992) (factual issue for trial court)

GEORGIA CIVIL DISCOVERY

WITH FORMS

excerpts

2008-2009 Edition

Issued in November 2008

By

WAYNE M. PURDOM

Judge, State Court
of DeKalb County

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(3) EVASIVE OR INCOMPLETE ANSWER. For purposes of the provisions of this chapter which relate to depositions and discovery, an evasive or incomplete answer is to be treated as a failure to answer; and

(4) AWARD OF EXPENSES OF MOTION.

(A) If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) SANCTIONS BY COURT IN COUNTY WHERE DEPOSITION IS TAKEN. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) SANCTIONS BY COURT IN WHICH ACTION IS PENDING. If a party or an officer, director, or managing agent of a party or a person designated under paragraph (6) of subsection (b) of Code Section 9-11-30 or subsection (a) of Code Section 9-11-31 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this Code section or Code Section 9-11-35, the court in which the action is pending may make such orders in regard to the failure as are just and, among others, the following:

(A) An order that the matters regarding which the or-

der was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders, or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; or

(E) Where a party has failed to comply with an order under subsection (A) of Code Section 9-11-35 requiring him to produce another for examination, such orders as are listed in subparagraphs (A), (B), and (C) of this paragraph, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders, or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Code Section 9-11-36 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that the request was held objectionable pursuant to subsection (a) of Code Section 9-11-36, or the admission sought was of no substantial importance, or the party failing to admit had reasonable ground to believe that he might prevail on the matter, or there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve

discussion of the remedies of exclusion versus continuance, see § § 4-12, 7-3, 12-8, supra.

§ 16-4 Award of expenses for motion seeking order to compel discovery

As discussed in § 16-2, supra, the discovery process is intended to operate without judicial intervention so the parties can conduct their discovery in a relatively short time and with a minimum of expense. When it is necessary to secure judicial involvement in the discovery process, both the time and expense of the litigation are substantially increased. In addition, resorting to the courts for a discovery problem increases the likelihood of acrimony between the parties, thus making a voluntary settlement of the main issues more difficult to obtain.

However, from time to time, judicial intervention is necessary in the discovery process. When a discovery dispute is brought to the courts, the statute attempts to ensure that the expenses of bringing or defending against the discovery motion are placed upon the party who is the cause of the discovery problem. This is true when a motion is brought seeking to compel answers to a deposition question, answers to interrogatories, inspections as authorized by O.C.G.A. § 9-11-34, or any of the other matters set forth in subsection (a) of O.C.G.A. § 9-11-37.

The statute provides that if the motion to compel discovery is granted, the court shall require that the expense of the moving party be paid by the party or deponent whose conduct necessitated the motion or the party or attorney who advised such conduct, or both. However, this award of expenses shall not be made if the court finds that the position of the respondent who did not provide the discovery was substantially justified. On the other hand, if the motion is denied and the discovery is not required to be produced, then the court shall require the moving party or attorney, or both, to pay the reasonable expenses of the respondent unless the court finds that the position of the movant in seeking the discovery was substantially justified. In the event that the motion is granted in part and denied in part, then the court may apportion the expenses among the parties or persons in a just manner.[1]

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221 Ga. App. 18, 22, 22(5), 470 S.E.2d 724 (1996).

These cases, however, while not overruled, seem to be repudiated by Hunter v. Nissan Motor Co., Ltd. of Japan, 229 Ga. App. 729, 494 S.E.2d 751 (1997) and subsequent authority. See § 4-10, supra.

[Section 16-4]

[1]O.C.G.A. § 9-11-37(a)(4).

In *Mayer v. Interstate Fire Insurance Co.*,[2] the Georgia Supreme Court held:

> To prevent either party from frivolously propounding questions or giving evasive answers, the trial court must require the losing party of the 37(a) battle to pay the expenses involved in obtaining the order, including attorney fees, "unless the court feels that opposition to the motion was substantially justified" or otherwise excused.

A petition to secure these expenses should be made by motion, and there must be an opportunity for a hearing concerning the award of expenses. The general practice is for the moving party to include a request for expenses in its motion seeking the order to compel discovery. Likewise, the respondent to the motion may request litigation expenses in its response to the motion. Naturally, the reasons for the position of the party or person either seeking or defending against an award of expense must be set forth.

If the court does award expenses, the amount awarded must be reasonable.[3] Therefore, a party or person seeking these expenses must provide the court with the amount of expenses sought and must also present evidence that the amount of expenses which are sought is reasonable.[4] If there is no evidence as to the amount of reasonable expenses caused by the failure to comply with the discovery order, then the court cannot award these expenses. The judge is not an expert capable of making a determination as to what amount of attorney's fees are justified without hearing evidence for the parties.[5] This evidence can be presented by affidavit accompanying the motion.[6]

An in-depth treatment of the necessary evidentiary foundation for the award of attorney fees and related expenses in the

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[2]Mayer v. Interstate Fire Ins. Co., 243 Ga. 436, 439, 254 S.E.2d 825 (1979).

[3]O.C.G.A. § 9-11-37(a)(4).

[4]Department of Transp. v. Hardaway Co., 216 Ga. App. 262, 454 S.E.2d 167 (1995) (overruled on other grounds by, Johnson & Johnson v. Kaufman, 226 Ga. App. 77, 485 S.E.2d 525 (1997)). This is particularly the case where the expenses, as in this case, have not yet been incurred.

[5]Tandy Corp. v. McCrimmon, 183 Ga. App. 744, 746(2), 360 S.E.2d 70 (1987). See Citibank (New York State) N. A. v. Hill, 161 Ga. App. 186, 288 S.E.2d 258 (1982); Gibbs v. Abiose, 235 Ga. App. 214, 508 S.E.2d 690 (1998).

[6]O.C.G.A. § 9-11-43(b); Uniform Superior Court Rule § 6.3 ("all motions in civil actions, including those for summary judgment, shall be decided by the court without oral hearing, except motions for new trial and motions for judgment notwithstanding the verdict"); accord, Esasky v. Forrest, 231 Ga. App. 488(3), 499 S.E.2d 413 (1998); ("a 'paper hearing' is sufficient to protect the rights at issue".); Uniform Superior Court Rule 6.3 (no hearing required on discovery motion); but see Oden v. Legacy Ford-Mercury, Inc. , 222 Ga. App. 666, 476 S.E.2d 43 (1996) (hearing with oral evidence required

discovery context is found in *Santora v. American Combustion, Inc.*[7] In particular, with an adequate foundation, billing records are admissible under the business record exception without personal knowledge of the billings by the person presenting the record, and testimony about the reasonableness of the fees need not be by the attorney who performed the work. In *Santora*, the lead attorney was supervising others and had to separate the work attributable to the discovery dispute from other work, but the trial court erred in rejecting the fees for work done by persons she supervised.

The expenses awarded may include the cost of document reconstruction as reasonable expenses incurred in obtaining the order, even when documents are damaged during the litigation as a result of innocent mistake by the responding party.[8]

The statute requires that there be an opportunity for a hearing on the issue of expenses of the motion. If any of the parties to the motion proceeding desire a hearing, they must specifically request it or the opportunity for the hearing will be waived.[9] In *Gomez v. Peters*,[10] the expenses awarded were for printing the transcript of the hearing on the motion to compel, to prove a stipulation which counsel later disavowed. The Court of Appeals held that even where it seems clear that the position taken by the losing party was not substantially justified, the party against whom costs are awarded must be afforded an opportunity to attack the reasonableness of costs or show that other circumstances make the award of costs unjust. The court studiously avoided stating that there was a right to an oral hearing, speaking instead of an "opportunity to be heard" and remanding the case to give appellant an opportunity to "respond" prior to the court reconsidering its decision.

Uniform Superior Court Rule § 6.3, allowing the court to decide most motions without a hearing, does not authorize an award without evidence nor can the failure to request a hearing be

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on default claim for unliquidated damages attorney fees); Santora v. American Combustion, Inc., 225 Ga. App. 771, 485 S.E.2d 34 (1997). Although *Santora* cited O.C.G.A. § 9–11–37 as justification of part of the trial court's action, the attorney fess were awarded as an independant unliquidated damages claim under O.C.G.A. § 9–15–14, so that, as in *Oden*, Uniform Superior Court Rule 6.3 would not apply.

[7]Santora v. American Combustion, Inc., 225 Ga. App. 771, 773(1)(b), 485 S.E.2d 34 (1997). Santora was a trial of a O.C.G.A. § 9-15-14 claim, rather than a motion hearing.

[8]Department of Transp. v. Hardaway Co., 216 Ga. App. 262, 454 S.E.2d 167 (1995) (overruled on other grounds by, Johnson & Johnson v. Kaufman, 226 Ga. App. 77, 485 S.E.2d 525 (1997)).

[9]Uniform Superior Court Rule 6.3.

[10]Gomez v. Peters, 221 Ga. App. 57, 57(3), 470 S.E.2d 692 (1996) (physical precedent only due to concurrence in judgment only).

considered as a waiver of objections "if the defendant has no opportunity to object at the time the order is made."[11] Arguably, the court could make a conditional award of attorney fees, if the parties were given a reasonable period to object and request a hearing. Of course, if a hearing is provided, counsel must be served with written notice of the hearing by mail; if notice is not provided, any order must be set aside and a new hearing provided.[12]

The court-ordered award of attorney's fees can be enforced through sanctions, including dismissal with prejudice of the complaint for a failure to pay;[13] willful failure to pay attorneys fees awarded pursuant to O.C.G.A. § 9-11-37 may justify sanctions, including dismissal, even when the award was erroneous.[14] A defendant however may deny willfulness by pleading poverty. In *Serwitz v. General Electric Credit Corp.*,[15] the trial court had ordered the defendant to pay plaintiff's attorney's fees for the failure of the defendant to comply with a order that he provide discovery to the other side. When the attorney's fees were not paid, the court conducted a hearing to determine whether additional sanctions should be applied. At that hearing, the disobedient party attempted to present evidence of his poverty as a defense against additional sanctions because of his failure to pay the attorney's fees. The trial court refused to allow the evidence, struck the defendant's answer and entered judgment against him. On appeal, the Court of Appeals reversed, holding that the hearing in question was the first opportunity to present the "poverty" defense; therefore, it was improper for the court to deny the defendant the opportunity to present evidence of the defense at that time. Accordingly, it is error to impose sanctions for failure to pay attorney fees without conducting an evidentiary

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[11]Fulton County Bd. of Tax Assessors v. Butner, 258 Ga. App. 68, 69(1), 573 S.E.2d 100 (2002).

[12]Edens v. O'Connor, 238 Ga. App. 252, 519 S.E.2d 691 (1999).

[13]Stokes v. Taco Bell Corp., 229 Ga. App. 558, 494 S.E.2d 355 (1997), disapproved in part on other grounds, Tenet Healthcare Corporation v. Louisiana Forum Corporation, 273 Ga. 206, 206(3), 538 S.E.2d 441 (2000); Toles v. G & K Services, Inc., 230 Ga. App. 452, 496 S.E.2d 550 (1998). See Mateen v. Dicus, 275 Ga. App. 742, 746, 621 S.E.2d 487, 490 (2005), judgment rev'd on other grounds by, 281 Ga. 455, 637 S.E.2d 377 (2006) (one of several grounds and evidence showed respondent had sufficient funds to pay obligation).

[14]Cole v. Hill, 286 Ga. App. 535, 537, 649 S.E.2d 633, 635 (2007); accord, Mathews v. City of Atlanta, 167 Ga. App. 168, 169, 306 S.E.2d 3 (1983).

[15]Serwitz v. General Elec. Credit Corp., 184 Ga. App. 632, 362 S.E.2d 439 (1987).

hearing, even when the respondent fails to file a written response to the motion for sanctions.[16]

Once the hearing is held, the court may explicitly reserve the imposition of attorney's fees. Reserving the award of fees was sufficient to preserve jurisdiction even after the Court of Appeals directed a grant of summary judgment, dismissing plaintiff's complaint, on interlocutory appeal.[17]

Another section of the Civil Practice Act authorizing the assessment of attorney's fees and expenses in litigation can be applicable in discovery disputes.[18] This statute, O.C.G.A. § 9-15-14, provides in subsection (a) that in any court of record, attorney's fees and expenses of litigation "shall be awarded" against the party, or his attorney, or both, when there is no justiciable issue raised. Subsection (b) provides that the court "may" assess attorney's fees and expenses if the conduct lacked substantial justification, was interposed for delay or harassment, or unnecessarily expanded the proceeding by other improper conduct, including abuses of discovery procedures. The expression "lacked substantial justification" means "substantially frivolous, substantially groundless, or substantially vexatious."[19]

The language in O.C.G.A. § 51-7-85, about that section and O.C.G.A. § 9-15-14 being exclusive remedies for frivolous litigation, does not preclude awards of attorney's fees under O.C.G.A. § 9-11-37.[20]

Whether parties representing themselves can recover attorney's fees for the time spent on the discovery dispute has not been definitively answered.[21]

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[16]Cole v. Hill, 286 Ga. App. 535, 537, 649 S.E.2d 633, 635 (2007).

[17]CSX Transp., Inc. v. Deen, 278 Ga. App. 845, 630 S.E.2d 119 (2006). But for the reservation, the order on remittur from the Court of Appeals would have been a final judgment.

[18]O.C.G.A. § 9-15-14. This section may be utilized after dismissal of plaintiff's complaint before a sanctions motion could be ruled on or in cases where plaintiff is an attorney acting pro se. See Harkleroad v. Stringer, 231 Ga. App. 464, 467, 499 S.E.2d 379 (1998).

[19]O.C.G.A. § 9-15-14(b).

[20]Great Western Bank v. Southeastern Bank, 234 Ga. App. 420, 507 S.E.2d 191 (1998).

[21]Compare Tandy Corp. v. McCrimmon, 183 Ga. App. 744, 746, 360 S.E.2d 70 (1987) (JJ. Banke, Deen, and Beasley, dissenting) with Harkleroad v. Stringer, 231 Ga. App. 464, 467, 499 S.E.2d 379 (1998). The dissent in Tandy found that a pro se attorney could not recover such fees; the majority did not reach the issue due to the failure of the other side to preserve the issue for appeal. In Harkleroad, an attorney representing himself, in part, was entitled to recover attorney's fees pursuant to O.C.G.A. § 9-15-14. The court discussed Tandy: "Thus, in Tandy the majority did not reach the issue presented here . . .. Moreover, unlike the discovery statute in Tandy, the abusive litigation statute provides for an award of 'reasonable and necessary at-

the matter of whether an order compelling him to make discovery was proper." In contrast, in *Mary A. Stearns, P.C. v. Williams-Murphy*,[6] the trial court issued an order compelling production of a client's file the day after a motion to compel was served on the former attorney, but at a hearing where the former attorney had no notice and was not present. At a subsequent contempt hearing, the attorney was allowed a full hearing on the merits of the order and then was held in contempt. The attorney challenged the validity of the ex parte issuance of the initial order, but the Court of Appeals turned back the challenge holding that "if the trial court has jurisdiction to make the order, it must be obeyed however wrong it may be."

The person being held in contempt must be the same person who was ordered to provide the discovery in the first order. In *American Express Co. v. Baker*,[7] the court issued an order compelling the plaintiff corporation to make a representative available for a deposition. When no one appeared, the defendant moved for sanctions. The trial court held a specific employee of the plaintiff in contempt and ordered him incarcerated until he responded to the discovery and paid attorney's fees. On appeal, the Court of Appeals reversed, pointing out that the earlier order directed the plaintiff-corporation, and not a specific individual, to provide the discovery and pay the attorney's fees.

In *Attwell v. Sears, Roebuck & Co.*,[8] the defendant failed to comply with an order requiring him to appear for a post-judgment deposition. The court found him in contempt for his failure to appear as ordered and again required him to appear for his deposition and to pay $250 in attorney's fees. This order was subsequently affirmed on appeal.

§ 16-10 Sanctions—Order involving examination of a person

O.C.G.A. § 9-11-35 (a) provides that the court may order a mental or physical examination (including a blood test) of a party or person in the custody or legal control of a party if the mental or physical condition of the person is in controversy. See Chapter 14, supra. Subsection (b)(2)(E) of Rule 37 (O.C.G.A. § 9-11-37) establishes sanctions if a party fails to comply with that order requiring such an examination. The sanctions can include any of those possibilities included in subsections (A), (B) or (C) of the same subsection. These sanctions are discussed in §§ 16-6, 16-7,

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[6]Mary A. Stearns, P.C. v. Williams-Murphy, 263 Ga. App. 239, 587 S.E.2d 247 (2003).

[7]American Exp. Co. v. Baker, 192 Ga. App. 21, 383 S.E.2d 576 (1989).

[8]Attwell v. Sears, Roebuck & Co., 189 Ga. App. 363, 375 S.E.2d 631 (1988).

and 16-8, supra. However, the sanction of contempt, set forth in subsection (D), is not available if the order involved the examination of a person.

§ 16-11 Award of expenses for obtaining order which applied sanctions

An award of expenses for obtaining an order on a motion to compel discovery is considered in § 16-4, supra. Many of the same principles applied in that section apply in seeking expenses for a motion for sanctions. Thus, although the court has a broad discretion in determining the amount of attorney's fees, the award must be supported by evidence of the amount of fees caused by the discovery failure.[1]

The last paragraph of subsection (b) of Rule 37, O.C.G.A. § 9-11-37(b), provides that either in lieu of any of the sanctions allowed in that section or in addition to those sanctions the court shall require the party failing to obey the sanctions order or the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure to respond to discovery. However, if the court finds that the failure to obey was substantially justified or other circumstances exist which would make such an award unjustified, then expenses need not be awarded. Where a drastic sanction is imposed, such as striking an answer, the court is ***not required*** to add an award of attorney's fees, even though the failure to obey was not substantially justified.[2] But the trial court may impose the sanctions and the expenses.[3]

In *Sneider v. English,*[4] the plaintiff filed a motion to compel the defendant to answer post-judgment interrogatories. The defendant neither answered nor sought a protective order; therefore, the plaintiff filed a motion to compel. In response to the motion to compel, the defendant raised a privilege. The court sustained the privilege, but assessed the defendant for the fees of plaintiff's attorney. This was within the discretion of the court and could be imposed under the facts of that case, even without an order to compel answers under subsection (a)(2).

A voluntary dismissal deprives the court of authority not only to impose other sanctions, but also to impose attorney fees under O.C.G.A. § 9-11-37. In *C & S Industrial Supply Co., Inc. v. Proc-*

[Section 16-11]

[1]Gibbs v. Abiose, 235 Ga. App. 214, 508 S.E.2d 690 (1998); Citibank (New York State) N. A. v. Hill, 161 Ga. App. 186, 288 S.E.2d 258 (1982); compare § 16-4, nn. 5, 6 supra.

[2]Gibbs v. Abiose, 235 Ga. App. 214, 508 S.E.2d 690 (1998).

[3]Chelena v. Milton Fried Medical Clinic, 171 Ga. App. 580, 581, 320 S.E.2d 583 (1984).

[4]Sneider v. English, 129 Ga. App. 638, 200 S.E.2d 469 (1973).

tor & Gamble Paper Products Co.,[5] the trial court issued an order compelling the plaintiff to produce certain documents. The documents were not produced and the defendant, acting pursuant to O.C.G.A. § 9-11-37(b), moved for sanctions. Minutes before the hearing on the motion for sanctions, the plaintiff filed a notice of voluntary dismissal pursuant to O.C.G.A. § 9-11-41(a). The trial court struck the plaintiff's notice of voluntary dismissal, dismissed the complaint, and assessed attorney's fees as sanctions under O.C.G.A. § 9-11-37(b). The appellate court reversed, holding that a plaintiff had a right to voluntarily dismiss under O.C.G.A. § 9-11-41(a) unless the trial judge had either entered an order terminating the case or announced that a decision had been reached that would terminate the case. The fact that the court could have terminated the case at the forthcoming hearing did not prevent the plaintiff's voluntary dismissal and once the plaintiff dismissed the case, the defendant could not recover attorney's fees as sanctions under O.C.G.A. § 9-11-37(b) (two judges dissented).

The defendant was not without a remedy, however; it could have filed a counterclaim for attorney's fees under O.C.G.A. § 9-15-14 after the dismissal. Where the plaintiff has violated a court order concerning discovery, the court would almost always have a basis to award attorney fees under this provision.

In contrast, once the hearing on discovery sanctions is held, the court may explicitly reserve the imposition of attorney's fees. Reserving the award of fees was sufficient to preserve jurisdiction even after the Court of Appeals directed a grant of summary judgment, dismissing plaintiff's complaint, on interlocutory appeal.[6]

III. SANCTIONS FOR FAILURE TO PROPERLY ADMIT

§ 16-12 Award of expenses when another party fails to properly admit

Subsection (c) of O.C.G.A. § 9-11-37 concerns expenses which might be incurred in having to prove matters which were

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[5]C & S Indus. Supply Co., Inc. v. Proctor & Gamble Paper Products Co., 199 Ga. App. 197, 404 S.E.2d 346 (1991). See also Mariner Health Care, Inc. v. PricewaterhouseCoopers LLP, 282 Ga. App. 217, 638 S.E.2d 340 (2006), cert. denied, (Feb. 5, 2007); Smith v. Memorial Medical Center, Inc., 208 Ga. App. 26, 28–29, 430 S.E.2d 57 (1993); Bailey v. Austin, 185 Ga. App. 831, 366 S.E.2d 214 (1988); Johnson v. Wade, 184 Ga. App. 675, 362 S.E.2d 469 (1987). Dismissal is not available to escape sanctions where defendant has filed a counterclaim, but is available where cross-claims and third-party claims have been filed. *Mariner Health Care, Inc., supra.*

[6]CSX Transp., Inc. v. Deen, 278 Ga. App. 845, 630 S.E.2d 119 (2006). But for the reservation, the order on remittur from the Court of Appeals would have been a final judgment.

requested to be admitted under O.C.G.A. § 9-11-36 and which the answering party refused to admit. See Chapter 15, supra.

Subsection (c) provides that if a party is served with a request to admit and fails to admit the genuineness of any document or the truth of any matter as requested, and the party requesting the admissions proves the genuineness of the document or the truth of the matter, then the party proving the matter can apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The statute also provides that the court shall enter such an order unless the court finds that the request was objectionable under subsection (a) of O.C.G.A. § 9-11-36; the admission was of no substantial importance; the party failing to admit had a reasonable ground to believe that he or she might prevail on the matter; or there was other good reason for the failure to admit.

It is not necessary that the court enter an order that the facts be admitted before applying the provisions of this subsection. In *Spencer v. Dupree,*[1] requests to admit were served upon the defendant, who waited four months before denying the requests. At trial, the defendant was permitted to present evidence contrary to the requests. At the conclusion of the proceeding, in which the plaintiff prevailed, the court awarded $150 in costs to the plaintiff for the untimely rendition of admissions. This award was affirmed as proper under O.C.G.A. § 9-11-37(c). The trial court simply penalized the defendant for waiting over four months to respond to the requests for admission, which it had authority to do, notwithstanding the fact that the defendant was allowed to introduce evidence to the contrary.

In *Foster v. Morrison,*[2] the plaintiff requested, both through interrogatories and requests to admit, that the defendant admit the authenticity of the plaintiff's medical records in possession of a doctor in Ohio. The defendant refused, and the plaintiff had to depose the Ohio doctor. The plaintiff moved for reimbursement of the expenses of that deposition. The court awarded the expenses, pointing out that O.C.G.A. § 9-11-37(b)(2) and (c) expressly authorizes the award of expenses in this fact situation.

[Section 16-12]

[1]Spencer v. Dupree, 150 Ga. App. 474, 479, 258 S.E.2d 229 (1979). Normally, the failure to respond to admissions is simply treated as an admission, and the opposing party may not controvert such admissions without a successful motion to withdraw admissions. See §§ 15-7, 15-8, supra.

[2]Foster v. Morrison, 177 Ga. App. 250, 252–253, 339 S.E.2d 307 (1985).